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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

STEFAN R. FAGHI, Plaintiff and Appellant, v. NATIONAL TITLE INSURANCE OF NEW YORK, INC., et al., Defendants and Respondents.	C087208 (Super. Ct. No. 34-2014-00168918-CU-BC-GDS)

Plaintiff Stefan R. Faghi brought this action in September *2014* against defendant National Title Insurance "Company" of New York, Inc. (National),[1] and a defendant entity that is not a party to this appeal (against whom plaintiff obtained a default judgment).[2] Plaintiff subsequently substituted a Doe defendant with defendant Madeline

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[1] National's actual corporate name does not include "Company."

[2] It is unclear why the parties continue to include this defendant entity in the title of this case in their briefing. We have corrected the caption accordingly. There may be other defendant parties; however, the record is unreliable (as we note later). In any event, no other defendant is involved in the present ruling or participating on appeal.

Lovejoy in April 2015.[3] Plaintiff did not effect service upon either defendant until October *2017*. Defendants thereafter moved to dismiss the complaint against them pursuant to both the discretionary and mandatory provisions for dilatory service of process. (Code Civ. Proc., §§ 583.210, 583.250, 583.410, 583.420.)[4] The trial court granted the motion to dismiss and entered a judgment of dismissal in favor of both defendants.

Plaintiff challenges this ruling on appeal. As we find the trial court's exercise of discretion to dismiss the appeal to be reasonable, we do not analyze plaintiff's claims in the context of the mandatory provision for dismissal. We will thus affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Given the nature of the appeal, we do not need to explain the substantive basis of this action. It suffices to note that plaintiff alleged he bought real property in Fair Oaks in October *2010* and thereafter discovered that improvements encroached on the boundary of neighboring property. He tendered a claim to defendant National, the title insurer, apparently in September 2012, from whom he had purchased a policy at the time he acquired the property. Defendant National denied the claim on a date not specified in the complaint.

The following procedural facts are contained in the declarations filed in connection with the motion to dismiss,[5] or elsewhere in the record.

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[3] The complaint neither identifies the individual defendant nor includes any allegations against her. The briefing in the trial court identifies Lovejoy as National's assistant vice-president and assistant secretary.

[4] Undesignated statutory references are to the Code of Civil Procedure.

[5] Plaintiff's initial opposition to the motion to dismiss stopped with the cover sheet to exhibit F. At the hearing on the motion to dismiss, the court allowed plaintiff to file the

Defendant National had acknowledged plaintiff's claim in a letter to his lawyer in September 2012. Defendant National's letterhead clearly identified its corporate name and an address in Irvine, California. Plaintiff's lawyer thereafter received a series of letters from a prior law firm representing defendant National regarding plaintiff's claim under his policy, which also stated the proper name for defendant National. Ultimately, defendant National denied the claim in August 2013 because the encroachments were not a matter of public record. In October 2014, plaintiff's lawyer apparently attempted to serve the complaint on the prior law firm, which did not accept it because it was not the agent of defendant National for service of process.

Without any supporting documentation, plaintiff's lawyer asserted in the trial court that he checked the Web site for the California Secretary of State in October 2014, where he learned the name of National's registered California agent for service of process, but "National was listed as 'Merged Out' " and a representative of the agent made the same assertion in a phone call.[6] Plaintiff's lawyer then found that National was listed on the Web site of the Florida Department of State, Division of Corporations. The listing included the correct corporate name of defendant National, a principal address in that state along with the name and address of its registered Florida agent (the "chief financial officer" of the State of Florida), and a California mailing address in Santa Ana,

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missing exhibits by the following day before it took the matter under submission without further argument. Its final order noted that it had received and reviewed the supplemental materials. These materials add little if anything to the documents otherwise under consideration in connection with the motion.

[6] We grant defendants' motion for judicial notice of official records of the California Secretary of State. (Evid. Code, §§ 452, subd. (c), 459, subd. (a).) Defendant National has been a registered foreign corporation under its current name since the 1990's and was in good standing as of January 2019. An entity named *Fidelity* National Title Insurance Company of New York was merged into Fidelity National Title Insurance Company in 2004 and ceased independent existence.

in care of defendant Lovejoy, its assistant secretary. Plaintiff's lawyer apparently made two efforts, once in November 2014 and once in January 2015, to serve National through the Florida chief financial officer, but both were rejected, the first time for failure to fill out the form properly and the second time on the ground that the office was not the agent for a National Title Insurance *Company* of New York, Inc.

Present counsel for defendant National learned in late April 2015 that plaintiff had made ineffectual service of this action upon *another* client—Fidelity National Title Insurance Company (see fn. 6, *ante*)—that was not involved in the underlying dispute. He pointed out to plaintiff's lawyer that this client was not a proper party, and that while he would be representing National and its officer in any litigation, neither had yet to be served. While plaintiff's lawyer acknowledged that he would be dismissing the improper parties, he did not disclose any plans to effect service upon the two present defendants.

Defense counsel shortly afterward pointed out to plaintiff's lawyer that the case management statement he had filed in August 2015 *falsely stated* that service had been effected on defendants, and that purported proofs of service that defense counsel had received were defective (specifying a date of service in Nov. 2014). In response to plaintiff's request, defendants' counsel also stated that he was not authorized to accept service of process on behalf of defendants. Plaintiff's lawyer then advised in October *2015* he would proceed with serving defendants.

However, the record is thereafter devoid of any activity until late September *2016*, when plaintiff's lawyer filed ex parte applications for service by publication in Orange County, asserting that a *January 2016* effort to serve defendants at the Santa Ana address listed on the Florida Web site resulted in a finding that the building was vacant. The clerk rejected the application with respect to defendant National for failure to pay the filing fee, and the court denied the application with respect to defendant Lovejoy because plaintiff had failed to show reasonable diligence in attempting to effect service otherwise.

Upon learning of these applications in a review of the docket in this case, defense counsel asked plaintiff's lawyer in December 2016 to provide any future order granting such applications.

In October *2017*, as noted above, plaintiff at last effected personal service on defendants at two addresses in Irvine, California, with defendant Lovejoy accepting service on behalf of National. The address for defendant Lovejoy was the same street address (different suite number) as was originally listed in National's September 2012 acknowledgment of plaintiff's claim.

In its ruling, the trial court noted that plaintiff's lawyer never explained why he did not simply serve defendant National at its Florida business address by first-class mail with return receipt requested. (§ 415.40.) With respect to the provisions for mandatory dismissal, the court concluded neither defendant was unamenable to service and plaintiff had failed to establish any basis for tolling the three-year time period to effect service. As for the provision for discretionary dismissals, "more than two years passed before [plaintiff] effected service[.] [Plaintiff] bore the burden of showing an excuse for the delay. Because [plaintiff] has not established a credible excuse, and because he did not exercise diligence throughout the two-year period, discretionary dismissals are warranted." It did not find any of the criteria specified in California Rules of Court, rule 3.1342(e) warranted denial of the motion.[7]

DISCUSSION

Diligence in seeking to effect service of process within two years is a primary consideration under the discretionary provisions for dilatory prosecution. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 439(3), p. 891.) The criteria for

[7] As plaintiff does not provide any analysis of these criteria in his briefing, we eschew them in the Discussion.

evaluating a delay in service are identical for discretionary dismissals and mandatory dismissals. (*Id*. § 442(2), p. 894.) Delay in service is judged under more stringent standards than delay in prosecution, and "can be excused . . . only for causes beyond the plaintiff's control" on which the plaintiff bears the burden of demonstrating excuse or justification. (*Id*. § 447(1), (2)(a), pp. 898, 899.) "[C]ourts generally reject excuses based on negligence [or] unilateral mistake." (*Id.* § 449(2), p. 903.) "[I]n practical effect, . . . an order of dismissal can be successfully challenged for abuse of discretion only where conduct of the defendant has contributed to the delay." (*Id*. § 450, p. 904.) It is the *inability* to locate a defendant after *diligent* efforts that provides an adequate excuse for untimely service. (*Ibid*.) A defendant's knowledge of a pending action does not excuse itself the failure to effect service. (*Scarzella v. DeMers* (1993) 17 Cal.App.4th 1762, 1771.) Counsel's failings are properly charged against a party; "attorney fault is frequently the reason for a discretionary dismissal." (*Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 134.) If a trial court was not unreasonable, a reviewing court cannot come to a different conclusion on appeal. (*Ibid*.)

We dispose of a meritless threshold argument. Plaintiff contends the trial court disregarded his January 2016 attempt to effect service on defendants at the Santa Ana address listed on the Florida government Web site. The trial court, however, expressly noted the September 2016 flawed attempts to obtain service by publication, which was premised on a reference to the January 2016 effort at service. Nor is the trial court's failure to reference expressly any of the exhibits filed after the hearing of any import, because in the first place we credit the trial court's express statement that it had considered the supplemental materials (Evid. Code, § 664); in the second place *nothing* in any of these documents is determinative (as they are essentially cumulative of the remainder of the factual record); and in the third place *this* court's assessment of the propriety of the exercise of the trial court's discretion takes the full panoply of the factual

record into consideration. We therefore reject out of hand the suggestion that the trial court did not properly exercise its duties.

As is typical in an appeal in which the standard of abuse of discretion applies, the argument of plaintiff boils down to a request for this court to exercise its evaluation of the facts differently from the trial court, rather than any cogent explanation of the manner in which the trial court's ruling was *unreasonable*: to quote his heading (with emphasis and capitalization deleted), "evidence of eight [*sic*] separate service attempts on defendants . . . should have resulted in a favorable ruling." He simply states ipse dixit that defendant National (overlooking the individual defendant) was "not amenable to service" without analytic or factual elaboration, beyond mentioning his inept efforts to serve National through the Florida state official—contending that this "made [service] practically impossible and certainly impracticable"—*and* his reliance on an outdated address on the official Florida Web site for defendants, disregarding the fact that *he already had the Irvine address since 2012* without explaining how he came to serve defendant Lovejoy at this address (or seemed able to discern a second Irvine address at which defendant Lovejoy accepted service on behalf of defendant National).

This record is utterly bereft of *any* reasonable diligence on the part of plaintiff's lawyer in effecting service on defendants within two years, or any evidence of any action on the part of defendants to place themselves beyond plaintiff's reach. The records of the California Secretary of State belie the reasonableness of the unsupported claim that defendant did not have a registered agent in California for service of process. The trial court also properly pointed out that plaintiff could have (but did not) effect service on defendant National at the corporate address listed on the Florida official Web site. The letterhead that plaintiff's lawyer received in *September 2012* contained the address at which he ultimately effected personal service on defendant Lovejoy (who could have accepted service for defendant National as well) in October 2017. Plaintiff's opposition

does not at any point attempt to account for (1) the *extensive* delays between the filing of his September 2014 complaint and his ineffectual efforts at service in Florida in November 2014 and January 2015 on defendant National that failed through his lawyer's *own errors;* (2) his lawyer's service in 2015 of the action on the *wrong* defendant; (3) his *single* arguably excusable error in attempting service on defendants in January 2016 at the address specified on the Florida official Web site (notwithstanding that he already had the correct address listed in correspondence from defendant National); (4) his unfounded attempts at service by publication in September 2016 (one of which foundered on his lawyer's failure to pay the filing fee); and (5) the subsequent *13-month delay* before his lawyer finally served the two defendants in October 2017, more than three years after filing the complaint. Plaintiff does not provide any authority under which present defense counsel or the law firm responding to his claim prior to the initiation of this litigation were obligated to accept service on behalf of their clients, and fails to demonstrate that either law firm frustrated any efforts to effect service properly. In short, the record shows that the trial court's exercise of discretion was not only reasonable, it was correct as a matter of law.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, Acting P. J.

We concur:

HOCH, J.

KRAUSE, J.